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No. 03-1199

IN THE

Supreme Court of the United States

EMPLOYERS INSURANCE COMPANY OF WAUSAU,

Petitioner,

v.

JOHNSON CONTROLS, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Wisconsin

RESPONDENT JOHNSON CONTROLS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTIONS PRESENTED

Pursuant to Supreme Court Rule 15.2, Johnson Controls objects to the question presented by the Petition because it does not accurately reflect the proceedings below. If this Court grants the Petition, the following would be an additional question that the Court would need to address prior to reaching the issue raised by the petitioner:

DID THE WISCONSIN SUPREME COURT, IN FACT, RULE *SUA SPONTE* THAT A GOVERNMENT "PRP LETTER" SEEKING AN ENVIRONMENTAL CLEAN UP WAS A "SUIT" TRIGGERING AN INSURER'S DUTY TO DEFEND WHEN (1) JOHNSON CONTROLS BROADLY SOUGHT REVIEW OF THE CONTINUING VIABILITY OF A PRIOR DECISION ADDRESSING THAT QUESTION, WITHOUT LIMITATION ON WHAT PORTIONS OF THAT DECISION WERE THE SUBJECT OF THE PETITION, (2) ALL BRIEFS SPECIFICALLY RAISED AND ADDRESSED WHY INSURANCE COVERAGE SHOULD OR SHOULD NOT DEPEND ON THE EXISTENCE OF A LAWSUIT, (3) THE CO-DEFENDANTS / CO-RESPONDENTS' COORDINATED RESPONSE BRIEFS EXPRESSLY ARGUED THAT A "PRP LETTER" WAS NOT A "SUIT" AND (4) THE "PRP LETTER AS SUIT" ARGUMENT WAS EXPRESSLY MADE BY BOTH SIDES DURING ORAL ARGUMENT?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent states that it has no parent corporation, nor does any publicly held company own 10% or more of its stock.

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STATEMENT OF THE CASE

A. Nature of this Case

This Petition arises out of a 15 year old environmental insurance coverage dispute involving the interpretation of comprehensive general liability ("CGL") insurance policies issued to Johnson Controls, Inc. ("Johnson Controls"). Johnson Controls filed suit in 1989 seeking insurance coverage for amounts it paid or would have to pay for third party property damage, including actual and potential claims under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), and state law equivalents. The defendants, including the petitioner, Employers Insurance Company of Wausau ("Wausau"), were numerous insurance companies who had issued CGL policies providing primary and excess liability coverage to Johnson Controls over a 40 year timeframe. Wausau was one of two "primary" insurers, the other being Travelers Indemnity Company ("Travelers"). The underlying liabilities for which coverage was sought arose out of alleged contamination at 21 separate sites.

B. *City of Edgerton v. General Casualty Co.* and Its Progeny

Five years into this case, the Supreme Court of Wisconsin decided *City of Edgerton v. General Casualty Co.*, 517 N.W.2d 463 (Wis. 1994), *cert. denied* 514 U.S. 1017 (1995), in which it held that costs incurred in responding to property damage caused by environmental contamination were not "damages" and that a letter from a government agency identifying the recipient as a "potentially responsible party" under CERCLA and demanding that it initiate a clean-up (known as a "PRP letter") was not a "suit" triggering an insurer's duty to defend.

Relying on *Edgerton*, the trial court dismissed Johnson Controls' lawsuit. Johnson Controls appealed. In the meantime, Wisconsin law in this area continued to evolve. As explained by the Wisconsin Supreme Court in the decision on which review is sought, *Edgerton* was flawed in many ways, and was immediately and strongly criticized in Wisconsin and across the country. (App. 53a-54a). *Edgerton*'s flaws were particularly acute, and obvious, in cases where an insured was joined in a third party lawsuit seeking clean-up costs under 42 U.S.C. §§ 9607 and 9613 — the notion that a claim for monetary reimbursement of costs incurred to repair damaged property was not a claim for "damages" under a liability insurance policy seemed impossible to square with basic tort and insurance law principles. (App. 27a). Ultimately, the Wisconsin Supreme Court decided that *Edgerton* did not apply where the insured faced a lawsuit seeking previously incurred costs. *General Cas. Co. v. Hills*, 561 N.W.2d 718 (Wis. 1997). However, rather than overrule *Edgerton*, the court distinguished it, stating that *Edgerton* continued to stand for the proposition that "receipt of a letter from the EPA or DNR requesting a party to propose a remediation plan does not constitute a 'suit seeking damages'." *Hills*, 561 N.W.2d at 725.[1]

Taken together, *Edgerton* and *Hills* meant that insureds who cleaned up environmental contamination themselves did not have coverage, while those sued by third parties for the same type of clean-up costs did have coverage. An anomalous

[1] The Wisconsin court's decision to distinguish *Edgerton* rather than overrule it, was one the court later came to regret. In *Johnson Controls*, Justice Crooks, the author of *Hills*, separately concurred in the majority opinion to lament the court's failure to previously overrule *Edgerton*, given the opportunity it had to do so in *Hills*. *Johnson Controls Inc. v. Employers Ins. Co. of Wausau*, 665 N.W.2d 257, 297 (Wis. 2003) ("In retrospect, it seems quite clear that we should have overruled, not distinguished, *Edgerton* six years ago."). (App. 62a).

consequence of these decisions, at least as they began to be construed by the lower courts of appeals, was that an insured's right to insurance coverage depended on variables that were not in the policy and seemingly made little sense, such as the identity of the claimant as a government or non-governmental party, the stage of the underlying proceedings, and whether the insured had been joined in an actual lawsuit. *See, e.g., Amcast Indus. Corp. v. Affiliated FM Ins. Co.*, 584 N.W.2d 218 (Wis. Ct. App. 1998).

C. The Wisconsin Court of Appeals' Treatment of Johnson Controls Under the *Edgerton/Hills* Framework

In 1998, the Wisconsin Court of Appeals issued a decision that attempted to reconcile *Edgerton* and *Hills* as they applied to this case. The court of appeals created a generic matrix of site "categories" and remanded the case to the trial court to apply its analysis to the 21 sites at issue. The categories were:

Category 1. "[A]n insured who is responsible for the contamination cleans up the site pursuant to a directive issued by a government under [CERCLA] ... or its state counterparts."

Category 2. "[A]n insured is responsible for at least part of the contamination of a site that it does not own, but has not been directed by a government to remediate the site. A governmental agency has, however, directed others responsible for the contamination ... to clean it up, and they sue the insured to recover the clean up costs attributed to the insured."

Categories 3 and 4. "[T]he insured is responsible for at least part of the contamination of a site that it does not own, and *has* been directed by a government to remediate the site but has not done so. The insured is sued either by the government to recover money it spent to clean up the site [Category 3], or by

the site's owner or others also responsible for the contamination who cleaned up the site at the government's direction [Category 4]."

(App. 98a-100a).

The Wisconsin Court of Appeals found that sites falling into Categories 1, 3 or 4 did not trigger coverage under CGL policies covering "damages", while Category 2 sites did trigger coverage.[2] The court of appeals remanded this case to the trial court for fact-finding and entry of a "global judgment". (App. 103a-104a).

On remand, Johnson Controls supplied a factual record addressing the four categories. Despite this record, the trial court found that none of the 21 sites were covered. As part of its decision, the trial court noted that coverage was precluded at sites involving a PRP letter because "there is no active 'suit' or 'suit for damages' as defined by *Edgerton*." (App. 127a; *see also* App. 129a, 133a, 134a, 137a, 138a, 140a).

Johnson Controls appealed the trial court's ruling as to application of the categories, but also reserved the right to appeal to the Wisconsin Supreme Court the continuing validity of *Edgerton*. The court of appeals affirmed, though in doing so it noted the "arbitrary" distinctions that *Edgerton* had produced,

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[2] The analysis of categories 3 and 4 relied upon reasoning in a case from the Seventh Circuit Court of Appeals, *Wisconsin Power & Light Co. v. Century Indemnity Co.*, 130 F.3d 787 (7th Cir. 1997), in which an insured who had not complied with an administrative order was compared to a life insurance beneficiary who murders his or her spouse. Based upon this analogy, the Wisconsin Court of Appeals held that an insured should not be able to "transmute" a non-covered claim into a covered one through "intentional wrongdoing" — by disregarding a clean-up "directive" that came before a "suit" that would have triggered a defense and coverage. *Id.*

while nonetheless acknowledging that it had no choice but to apply those distinctions, since "this is the law set by our supreme court and we are obligated to apply this law." (App. 88a).

D. Proceedings Before the Wisconsin Supreme Court

In January 2002, Johnson Controls petitioned the Wisconsin Supreme Court for review of the court of appeals decision. In its Petition to the Wisconsin court, Johnson Controls sought review of the following question (among others):

> Should *City of Edgerton v. General Casualty Co.*, 184 Wis.2d 750, 517 N.W.2d 463 (1994) be overruled in light of the "arbitrary" and "debatable" distinctions it has produced and the discrediting of authorities upon which it relied?

(App. 149a-150a).

The Wisconsin Supreme Court accepted the case without limitation on the issues presented. In the brief it subsequently filed with that court, Johnson Controls argued that insurance coverage for environmental liability should not depend on the existence of an actual lawsuit, the stage of the underlying claim at the time of any clean-up or settlement for which coverage was sought, or the identity of the claimant as a government or non-government party.

The insurers, including Wausau, sought an extension of time from the Wisconsin Supreme Court to file response briefs. (R-App. A-1). The insurers informed the court that an extension was needed to "permit Wausau and the dozens of other Defendants-Respondents the necessary time to coordinate

their briefing efforts. . ." (R-App. A-1). The court granted the requested extension and the insurers did indeed seem to have allocated briefing responsibility. Two principal briefs—submitted by counsel for each of the "primary" insurers on the case, Travelers and Wausau—were filed, with joinders filed by the many excess insurers in the case.

Both respondent briefs expressly argued the reasons why pre-suit liability should not be covered. Contrary to Petitioner's suggestion in its Petition to this Court, the "PRP letter as suit" issue was expressly briefed. Travelers' brief provided a detailed argument that a PRP letter was not a "suit" in a section of its brief titled: "A PRP Letter Or The State Agency Equivalent Is Not A Suit". (R-App. B-1).

Also contrary to Wausau's suggestion in its Petition to this Court, the "suit" issue was expressly argued before the Wisconsin Supreme Court. At oral argument, counsel for Johnson Controls reiterated the point made in its briefs that coverage for environmental liability should not depend upon the existence of a lawsuit. Moreover, counsel expressly noted that the Court should reconsider its original ruling in *Edgerton* that a PRP letter was not a "suit":

> We had a PRP letter. And a PRP letter is the start of something adversarial and coercive and extremely dangerous and extremely costly. I commend the Utah case to you, Quaker State, in which the full panoply of harsh things that can happen to somebody who ignores a PRP is set out some detail. The Indiana case, Travelers Indemnity, who said, you know, the other half of the CGL policy says, and I just want to read it, it says, "the company shall have the right and duty to defend any suit against the insured seeking damages account of such property damages." That's separate

> from the duty to indemnify, I mean that's separate from the duty to pay all sums legally obligated. In this case you don't even have to get to the duty to defend in my judgment because we put our insureds on notice and they abandoned and therefore we did what we had to do. But there's a respectable body of law around the country which we cited to this Court that increasingly has been speaking with one voice that says that the word suit is ambiguous. Justice Abrahamson in dissent, I believe, in *Edgerton* made that point and I think that point's made by a lot of other judges.

Oral Argument, available at www.wicourts.gov/ra/011193.ram

Counsel for Travelers responded to this portion of Johnson Controls' oral argument on the "suit" issue:

> In urging the Court to overrule the *Edgerton* decision, Johnson Controls is asking the Court to take contract terms that it has previously found to have clear and unambiguous meanings, namely suit and damages, and could now hold these terms mean something completely different than the Court previously said they meant.... The key dispositive issue before the Court of Appeals and the precedents of this Court, which the Court of Appeals faithfully applied, is what do the terms "suit" and "damages" mean in the context of the CGL policy. This Court has found that suit means a lawsuit filed in a Court of law and damages does not include response costs under CERCLA or similar state regulatory statutes. It is difficult to imagine anything that would be more contrary to the principles of *stare decisis* than Johnson Controls' request that this Court now announce that these terms again mean something completely different. *Id.*

On July 11, 2003, the Wisconsin Supreme Court issued a decision reversing the court below. (App. 1a – 63a) In its decision, the Wisconsin Supreme Court found that the mere stage of proceedings of an underlying claim could have no logical bearing on whether that claim was covered by insurance. An insurer's duty to indemnify was triggered once the insured was required to spend money for a clean-up. Consistent with this ruling the Wisconsin court went on to observe that an insurer's duty to defend was triggered because, given the practical realities of CERCLA proceedings, a PRP letter should be considered a "suit" for insurance purposes. (App. 34a – 41a). In short, the court overruled *Edgerton* in its entirety.

Following the Wisconsin court's decision, the insurers filed motions for reconsideration. Amicus briefs were also filed and accepted by the court. Among the issues extensively briefed in Wausau's motion was that the court should reconsider its holding that a PRP letter was a "suit." (R-App. C-5-12). The motion for reconsideration was denied.

REASONS FOR DENYING THE PETITION

A. This Is Not an Appropriate Case For the Court to Consider Whether *Sua Sponte* Decision-Making by an Appellate Court Constitutes a Due Process Violation

Petitioner asks this Court to establish a rule that appellate courts should be prohibited, as a matter of constitutional law, from ruling on a point of state law unless that point is presented to the appellate court for review and briefed and argued by the parties, and the parties have a full opportunity to be heard on the point. As a preliminary matter, whatever the merits of such a rule, this is not an appropriate case for its consideration. The question of whether a PRP letter is a "suit" was presented to the Wisconsin court for review, it

was briefed, it was argued, and the parties had ample opportunity to be heard on it. If this Court grants the Petition, it would likely never reach the issue for which review is sought.

Johnson Controls' petition for review to the Wisconsin Supreme Court expressly asked, among other things, whether *Edgerton* should be "overruled." (App. 149a-150a). This statement of the issue sufficiently raised the continued validity of that case, including that portion addressing whether a PRP letter constitutes a "suit" under a standard CGL insurance policy.[3]

In its opening brief, Johnson Controls argued at length that an insurer's duties arise prior to the filing of an actual lawsuit. The reasoning in support of this argument applies with equal force to the specific question of whether a PRP letter is a "suit" for insurance purposes.[4]

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[3] The Supreme Court of Wisconsin interprets its appellate rules to permit consideration of "arguments" not addressed by the parties, as long as they are fairly contained within the "issue" presented for review. *State v. Weber*, 476 N.W.2d 867, 868 (Wis. 1991) (holding that a statement of the issue permits consideration of all supporting arguments, even if the supporting argument is not addressed by parties). This Court's Rule 14.1(a) addresses the same scenario. Under Rule 14.1(a), this Court may consider arguments not addressed by the parties if they are "fairly included" within the question presented in the petition. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379-80 (1995) (considering an argument fairly included in the petition although not argued by the parties). Under Johnson Controls' broad statement of the issue of whether *Edgerton* should be overruled, the court could properly consider all aspects of *Edgerton*, including the "PRP letter as suit" portion of that case, even in the absence of argument by the parties. Although this avenue is available to appellate courts, the Supreme Court of Wisconsin did not need to rely on this rule of decision-making because the "suit" argument was actually briefed and argued by the parties.

[4] The degree to which these issues are intertwined is demonstrated by a decision by the California Supreme Court, *Certain Underwriters at Lloyd's of London v. Superior Court ("Powerine")*, 16 P.3d 94 (Cal. 2001), where the

That these arguments are related is evidenced by the insurers' coordinated response briefs, which expressly addressed the specific question of what is a "suit." Petitioner's co-defendant, Travelers, devoted an entire section of its brief to the "suit" argument. In a section of its brief entitled "A PRP Letter Or The State Agency Equivalent Is Not A Suit", Travelers argued at some length that Johnson Controls had "merely received PRP letters, similar letters or notices requesting remediation" and that this correspondence did not constitute a "suit" under Wisconsin law. (R-App. B-1).

Contrary to what is claimed in the Petition, the question of what is a "suit" was also addressed at oral argument. As demonstrated by excerpts from oral argument, quoted in the Statement of the Case above, counsel for both Johnson Controls and Travelers expressly argued the point. Citing specific case law, counsel for Johnson Controls argued that the coercive and costly nature of a PRP letter triggers an adversarial process. Counsel for Johnson Controls also suggested that a substantial body of case law has found the word "suit" in a CGL policy ambiguous. Counsel for the insurers responded to this argument by noting that the definition of the terms "suit" and "damages" was the "key dispositive issue" before the Supreme Court of Wisconsin.[5] Counsel went on to note that "this Court

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California Supreme Court had found that there was no duty to indemnify for "damages" unless and until there was a duty to defend, which was not triggered until there was a "suit", and that since a PRP letter was not a "suit" an insured receiving such a letter had no coverage. The insurers argued the *Powerine* rationale to the Wisconsin Supreme Court, which expressly rejected it. (App. 47a).

[5] As with briefing, the dozens of insurers in this case delegated their argument to two attorneys, one representing Wausau and the other Travelers. Counsel for Travelers made the oral argument regarding "suit."

[the Wisconsin Supreme Court] has found that suit means a lawsuit filed in court."

Finally, on reconsideration Wausau (and the other insurers) had the opportunity to make, and did make, all of the same arguments Wausau now says it was deprived from making on the "suit" issue. There is nothing to suggest that the Wisconsin court refused to reconsider the case for any reason other than that it did not find those arguments persuasive.[6]

The issue presented to the Wisconsin Supreme Court provided notice and opportunity to argue the meaning of the term "suit," and that argument was, in fact, made. There is no basis in the record to suggest otherwise. The facts of this case do not provide a meaningful opportunity for this Court to clarify whether *sua sponte* statements of law by appellate courts are constitutionally prohibited as violations of due process.

It is thus no answer in this case to suggest, as Wausau does, that at "some point" there exists an imaginary, ill-defined

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[6] Wausau is simply wrong in claiming that the Wisconsin Supreme Court may deny such a motion "for any reason, or, as in this case, for no reason at all." Pet'n at 19. The Wisconsin Supreme Court's procedures on reconsideration are set forth in that Court's internal operating procedures which provide that reconsideration "*will* ensue only when the court has overlooked controlling legal precedent or important policy considerations or has overlooked or misconstrued a controlling or significant fact appearing in the record." Wis. S. Ct. IOP 2 J (emphasis added). There is no basis to suggest or conclude that the Wisconsin Supreme Court does not follow these procedures. Indeed, as recounted by the Wisconsin Supreme Court in *Johnson Controls* (App. 8a), the principal case on which *Edgerton* had relied was *School Dist. of Shorewood v. Wausau Ins. Cos.*, 488 N.W.2d 82 (Wis. 1992). That case had originally been decided in favor of the insured. *School Dist. of Shorewood v. Wausau Ins. Cos.*, 484 N.W.2d 314 (Wis. 1992). Upon the insurer's motion for reconsideration, the Wisconsin Supreme Court withdrew its original decision and issued a decision in favor of the insurer, without further briefing or re-argument.

line that appellate courts cannot constitutionally cross in this area. Wherever such a line may exist, it was not crossed in this case. Indeed, it is telling that Wausau also acknowledges that appellate courts can "undoubtedly" in some situations examine issues *sua sponte*, but says little about what those circumstances are. Pet'n p. 3. Is it where there is no mention of the issue at any stage of appellate court proceedings? Wausau would fail to meet such a test, given what was briefed and in the oral argument transcript. Is it where there is no state law procedure allowing the point to be addressed at reconsideration? Wausau would fail here too, since Wausau was afforded every right to, and did, challenge the court's "suit" ruling on reconsideration under Wis. Stat. § 809.64. At bottom, Wausau is left only with its complaint — the real reason it has come to this Court — that this decision "might" cost it "tens of millions of dollars" due to its effect in other cases. But the fact is, the insurer defendants had the opportunity to argue the issue, they did argue the issue and the Wisconsin Supreme Court ruled against them. Whatever this Court's views may be on *sua sponte* decision-making, there is no reason for this Court to take review in this case.[7]

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[7] The complexity of the factual record, together with its underlying legal framework, would also suggest that this is not the right case, from a resource allocation standpoint, for examination of the due process issue set forth in the Petition. In order to determine whether any due process violation is so egregious that it outweighs Wisconsin's strong interest in developing its law, this Court would need to gain an understanding of a 15 year old case record, involving 21 Superfund sites, activities spanning over 40 years, and 30 plus insurers, involving years of discovery and two trips to the Wisconsin court of appeals against the backdrop of a ten year on-going legal controversy in Wisconsin over the *Edgerton* decision. The Court would be required to determine whether or not the issue of an insurer's pre-suit obligations—which was a primary focus of the parties' briefing—would fairly encompass a ruling that a pre-lawsuit PRP letter should constitute a "suit" for insurance purposes, particularly where the specific "PRP letter as suit" point was expressly addressed in the insurers' coordinated briefing effort and by both

B. The Constitution Does Not Prohibit Appellate Courts from Declaring the Law *Sua Sponte*

The rule proposed by Wausau—that there should be a constitutional bar on an appellate court ruling on a point of state law unless it is fully presented to the court for review through the written briefs of the parties prior to a motion for reconsideration—is not a rule that this Court need, or should, consider adopting at this time. Indeed, such a rule would deprive appellate courts of needed flexibility in carrying out their law-making function, and would fly in the face of decades of judicial practice, including within this Court, where important points of law have, in the Court's discretion, long been crafted without the full, or even any, development of those points in the parties' briefs or arguments.

While we are not aware of any recent trend of the type claimed by Wausau in which this discretion has been expanded, we are aware that appellate courts—including this Court—have long felt unconstrained to announce new rules of law without briefing, where deemed necessary to the orderly and proper development of the law. No less a rule of law than the Erie Doctrine was decided without the issue having been raised by the parties. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *accord Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999) (*sua sponte* consideration of whether to impute liability for punitive damages under agency principles); *United States v. International Bus. Machines Corp.*, 517 U.S. 843 (1996) (*sua*

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sides at oral argument. This Court would then need to delve into the underlying policies concerning Wisconsin law, and the extent to which the Wisconsin Supreme Court's lawmaking function in this particular case outweighs any potential concerns of the individual litigants concerning notice and an opportunity to be heard.

sponte decision that federal statute is unconstitutional); *Arcadia v. Ohio Power Co.*, 498 U.S. 73 (1991) (*sua sponte* consideration of issue "antecedent to" the dispute); *Teague v. Lane*, 489 U.S. 288 (1989) (*sua sponte* consideration of rules governing habeas review); *Batson v. Kentucky*, 476 U.S. 79 (1986) (*sua sponte* consideration of peremptory challenge framework); *Michelin Tire Corp. v. W.L. Wages*, 423 U.S. 276 (1976) (*sua sponte* consideration of whether state statute is unconstitutional); *Mapp v. Ohio*, 367 U.S. 643 (1961) (*sua sponte* decision that exclusionary rule barring illegally obtained evidence applies to the states through the Fifth and Fourteenth Amendments); *Boynton v. Virginia*, 364 U.S. 454 (1960) (*sua sponte* consideration of issues to avoid reaching constitutional question).

The most vocal criticisms of *sua sponte* decisions are typically found in dissenting opinions. It is notable that, while dissenting opinions in the cases cited above criticized the *sua sponte* decisions of the majority as ill advised, none suggested the decisions were a violation of due process. *See Kolstad*, 527 U.S. at 553 (Stevens, J., dissenting); *International Bus. Machines Corp.*, 517 U.S. at 863 (Kennedy, J., dissenting); *Batson*, 476 U.S. at 112 (Burger, C.J., dissenting); *Teague*, 489 U.S. at 330-31 (Brennan, J., dissenting). These dissenting opinions confirm the absence of any constitutional mandate prohibiting *sua sponte* decisions by appellate courts. Justice Scalia has confirmed this point: "[T]he refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate, and there are times when prudence dictates the contrary." *Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., dissenting). In the absence of a constitutional question, this Court has no reason, or jurisdiction, to grant the Petition.

Even if the Due Process Clause were implicated by *sua sponte* decisions of state courts declaring state law, there would be no violation in this case. Due process is, as Wausau acknowledges, a flexible concept. A due process analysis involves the threefold balancing of the private interests affected by the official action, the risk of an erroneous deprivation of such interest through the procedures used, and the governmental interest at stake. *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *City of Los Angeles v. David*, 123 S. Ct. 1895, 1896 (2003).

When it comes to weighing these interests in the area of an appellate court's law-making function, the governmental interest at stake has always been considered paramount. It is not a "due process" violation when a court makes new law, simply because some party who will be adversely affected by the discharge of that function, claims not to have had an opportunity to completely "brief" the issue. Indeed, by that rationale, appellate courts, and legislatures for that matter, would deprive parties of due process every day, for the law is constantly evolving in ways that may have an adverse impact on countless parties, sometimes severely so, without providing any meaningful input or right to be heard on the issue. This Court long ago held that such process is not required:

> Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex

> society, by their power, immediate or remote, over those who make the rule.

Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915). While this Court's decision in *Bi-Metallic* was applied to administrative action, the reasoning applies with equal force to appellate courts in the exercise of their law-making function. Judges of state courts of last resort have the inherent power to declare the common law of the state.[8]

In this regard, Wausau's reliance on what it characterizes as the "similar" case of *Brinkerhoff–Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930) is misplaced. In *Brinkerhoff*, the Missouri Supreme Court had imposed a newly created procedural "exhaustion" requirement on the petitioner's claim that certain tax levies were being assessed in a discriminatory manner, then found that the administrative remedy that had to be exhausted was unavailable due to the petitioner's delay in seeking it. The problem was not that the lower court had imposed the requirement *sua sponte*, but that the new requirement in essence acted as an *ex post facto* procedural bar. Indeed, in the course of its opinion, this Court made it plain that this was the "due process" violation, when it stated that "if the administrative remedy were still available to the plaintiff, there would be no denial of due process . . ." *Id.* at 455 n.9. Of course, to the extent the case could somehow be

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[8] For at least that reason, this case does not present "a similar action" to that in *Turn-Key-Tech LLC v. National Film Laboratory Inc.*, No. 03-1138 (pet'n for cert. filed February 3, 2004). Pet'n at 3, 28. The case at bar involves a statement of a rule of law by the highest court of a state, whereas *Turn-Key-Tech* involves the Federal Circuit's *sua sponte* modification of a district court's ruling on the facts in an infringement lawsuit. In *Turn-Key-Tech*, the Federal Circuit dismissed the district court's patent claim construction in favor of its own *sua sponte* construction. *Turn-Key-Tech, LLC v. National Film Lab. Inc.*, 2003 WL 22097823 at *2 (Fed. Cir. Oct. 6, 2003).

construed as condemning *sua sponte* appellate decision-making as a "due process" violation, it would have been implicitly overruled by the intervening decades of Supreme Court precedent described above.

Finally, even if *sua sponte* decisions in some cases could implicate the Due Process Clause, there exists no violation in this case because Wausau does not assert an adequate interest in "property" under the Fourteenth Amendment. In that regard, it is important to note that Wausau is not seeking *certiorari* review in order to escape the effects of any money judgment or other specific court action that could even potentially amount to a taking of a property interest without an opportunity to be heard. The Wisconsin Supreme Court did nothing more than declare the law and remand the case back to the trial court for further proceedings. Those proceedings will likely include trial or summary judgment on numerous contested issues, and perhaps even further proceedings in the Wisconsin appellate court system, before there is any final judgment in this case.

Thus, assuming *arguendo* that the issue of *Edgerton's* continuing validity had not been raised in Johnson Controls' petition to the Wisconsin court, assuming that the coordinated briefing effort of the insurers had not raised it, assuming that it was not raised at oral argument and assuming there was no reconsideration process available to raise it, there still would be no due process violation here. That the Wisconsin Supreme Court, in the process of overturning a bad case precedent that presented a threshold bar to a claim for insurance coverage, also took the occasion to re-examine a closely related subsidiary issue that would likely come to the fore on remand and in other cases, is hardly remarkable or unprecedented, and nothing more than an exercise of that court's institutional power to declare the

law and provide guidance to the parties and litigants in other cases. Such an exercise presents no due process claim.

Due process is not required unless a party is being deprived of an interest in "property" within the Fourteenth Amendment. *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). This Court, in *Roth,* noted that while it "has eschewed rigid or formalistic limitations on the protection of due process, it has at the same time observed certain boundaries." *Id.* at 572. These boundaries require that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577.

Applying this definition of "property" to this case, Wausau must show that it has a "legitimate claim of entitlement" to a particular interpretation of the word "suit" by the Wisconsin Supreme Court. It is a showing Wausau cannot possibly make. A party simply does not have a legitimate entitlement to have an appellate court declare the law in any particular manner, even when overruling a prior decision:

> There is no vested right in the decisions of a court and a change of decision does not deprive one of equal protection of the laws or property without due process of law. Even though prior decisions of a state court have established a rule of property, a departure therefrom in a subsequent decision does not, without more, constitute a deprivation of property without due process of law under the Fourteenth Amendment.

Baumann v. Smrha, 145 F. Supp. 617, 625 (D. Kan. 1956) (*citing O'Neil v. Northern Colorado Irrigation Co.*, 242 U.S. 20, 26-27 (1916)); *accord Sunray Oil Co. v. Commissioner of*

Internal Revenue, 147 F.2d 962, 963-64 (10th Cir. 1945); *Ward v. Harding*, 860 S.W.2d 280, 288 (Ky. 1993); *D.J.L. v. Armour Pharm. Co.*, 704 A.2d 104, 115 (N.J. Super. Ct. Law Div. 1997). Wausau has no property interest in the Wisconsin Supreme Court's interpretation of "suit" and pronouncement of state common law. Therefore, under no circumstances could there be a due process violation, even if the issue had not been briefed or argued by the parties prior to the Wisconsin Supreme Court's decision and on reconsideration.

CONCLUSION

For the foregoing reasons, Johnson Controls respectfully requests that the Petition be denied.

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APPENDIX A

SUPREME COURT
OF WISCONSIN

* * * *

MOTION FOR EXTENSION OF TIME IN WHICH TO FILE RESPONDENT'S BRIEFS

Defendant-Respondent Employers Insurance of Wausau A Mutual Company ("Wausau") respectfully moves this Court for an Order, pursuant to Sections 809.14 and 809.82(2) of the Wisconsin Statutes, granting Wausau and the other Defendant-Respondents a short extension of time to file Respondent's Briefs up to and including July 2, 2002. Presently, Wausau's Respondent's Brief and the Respondent's Briefs of all of the other Defendant-Respondents are currently due on June 11, 2002.

Good cause exists for granting Wausau and the other Defendant-Respondents this short extension of time to respond to Plaintiff-Appellant Johnson Controls, Inc.'s ("JCI") Brief and Appendix. The requested three-week extension will permit Wausau and the dozens of other Defendant-Respondents the [3]necessary time to coordinate their briefing efforts and thereby minimize the number and volume of Respondents' Briefs filed with the Court.

The Court of Appeals affirmed the Circuit Court's grant of summary judgment to Wausau and the other Defendant-Respondents on December 27, 2001. JCI filed a Petition for Review, which was accepted by this Court pursuant to the Order, dated April 22, 2002, in which JCI raised a number of issues concerning the Court of Appeals ruling and expressly requested that this Court overturn existing Supreme Court case law.

This Court's Order provided that JCI's Brief was due thirty days thereafter, or May 22, 2002. The Order also directed that defendants-respondents' briefs be filed 20 days thereafter, or June 11, 2002.

This appeal stems from an insurance coverage dispute in which JCI seeks coverage for costs that it allegedly incurred in connection with alleged environmental liabilities arising from environmental contamination at 21 sites throughout the United States. In addition to Wausau, more than two dozen other insurance companies also are Defendants-Respondents in this appeal. In light of the significance of the issues and the relief requested by JCI, each of the Defendants-Respondents has a heightened interest in the briefing of this appeal.

In any multi-party appeal, preparation of Respondents' Briefs that may be joined in by numerous Defendants-Respondents necessarily requires additional time beyond what is typically required to prepare a Respondent's Brief in an [4]appeal in which there is only one or two Respondents. The additional coordination time is necessary to allow each Respondent the opportunity to review, comment upon, revise and approve the brief. Drafts of briefs must be exchanged, reviewed, revised and approved by each Defendant-Respondent. This procedure is particularly exacerbated because of the large number of Defendant-Respondents in this case.

In addition, the final drafts of any Defendant-Respondent Briefs likely will be subject to approval by one or more of the Defendant-Respondents' internal legal staff. This requires even more additional time and coordination before one or more Defendant-Respondent Briefs may be approved by all joining parties and filed with the Court.

If granted this extension will allow Wausau and the more than two dozen other Defendant-Respondents a total of 51 days to prepare and file Defendant-Respondent Briefs. In light of the above, this is a

reasonable time period for Wausau and the Defendant-Respondents to coordinate and minimize the number of Respondent's Briefs. These efforts will simplify and decrease the burden on this Court because, as a result, a limited number of Defendant-Respondents' Briefs will be filed as opposed to the possibility of dozens of such briefs being filed if this extension is not granted.

[5]Therefore, based upon the foregoing, Wausau respectfully requests that the Court grant an extension of time, up to and including July 2, 2002, for Wausau and the other Defendant-Respondents to file their Respondent's Briefs.

* * * *

APPENDIX B

SUPREME COURT
OF WISCONSIN

* * * *

BRIEF AND APPENDIX OF THE TRAVELERS INDEMNITY COMPANY

* * * * [32] * * * *

(b) A PRP Letter Or The State Agency Equivalent Is Not A Suit.

Under the plain language of the CGL policies, an insurer's "duty to defend" is not triggered unless and until a "suit" has been filed. With respect to many of the sites for which JCI seeks coverage[10], no lawsuit has been filed at all. Instead, JCI merely received PRP letters, similar state letters or notices requesting remediation. These letters and notices are not "suits," as that term has been defined under [33]Wisconsin law, and thus do not give rise to any defense obligations on the part of the insurers.

The policy term "suit" has a plain and unambiguous meaning under Wisconsin law. A "suit" is: "any proceeding by one person or persons against another or others *in a court of law* in which the plaintiff pursues, *in such court*, the remedy which the law affords him, for the redress of an injury or the enforcement of a right, whether at law or equity." *State v. P.G. Miron Const. Co., Inc.*, 181 Wis. 2d 1045, 1053, 512 N.W.2d 499, 503 (1994). Thus, as this Court held in *Edgerton*: "the primary attribute of a "suit" is that parties to an action *are involved in actual court proceedings, initiated by the filing of a*

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10 With respect to Travelers policies, no response costs suits have been filed in connection with the Lakeland, Goshen and Compton Sites. (T-Ap. 003, 065-067, 069-070)

complaint." 184 Wis. 2d at 775 (emphasis added). *See also Accounting Data, Inc. v. McMurtrie*, 78 Wis. 2d 89, 92, 253 N.W.2d 534, 535 (1977)(the term suit "applies to any proceeding in a court of justice by which a party pursues the remedy which the law affords for litigating a subject of controversy between adverse parties")(quoting *Milwaukee L. H. & T. Co. v. Ela Co.*, 142 Wis. 424, 428, 125 N.W. 903, 905 (1910).

[34]Under this definition, a PRP letter or administrative notice is not a suit. It is not a proceeding in a court in which the plaintiff pursues a remedy. Indeed, the *Edgerton* Court rejected the mere suggestion that PRP letters were the "functional equivalent" of a suit. 184 Wis. 2d at 776 (quoting *Ryan v. Royal Ins. Co. of Am.*, 916 F.2d 731, 741 (1st Cir. 1990)). Such a status would not be good enough; as this Court noted in *Edgerton*, "[either] there is a suit or there is not." 184 Wis. 2d at 781.

For these reasons, the Court should reaffirm its holding in *Edgerton* that the PRP letters and their state equivalent do not constitute "suits" for purposes of the CGL policies.

* * * *

APPENDIX C

SUPREME COURT
OF WISCONSIN

* * * *

DEFENDANT-RESPONDENT EMPLOYERS INSURANCE OF WAUSAU'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR RECONSIDERATION

* * * *

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III. THE COURT SHOULD RECONSIDER ITS DECISION ON THE "SUIT" ISSUE BECAUSE IT OVERLOOKS *STARE DECISIS*, INSURANCE CONTRACT CONSTRUCTION PRINCIPLES, AND PUBLIC POLICY CONSIDERATIONS.

A. The Decision Overlooks The Application of *Stare Decisis* To *Edgerton's* Holding On The "Suit" Issue.

The decision is extraordinary as well because it overturns established Wisconsin law on the "suit" issue with no explanation of why departure from *stare decisis* was appropriate.

In the context of the "damages" issue, the decision explained the importance of *stare decisis* and the standard by which the court may, in extremely rare circumstances, depart from it. ¶¶ 94-95, 98-99. Despite these statements of the doctrine's importance and the rigorous standards that must be met to overcome it, there is no mention of how the standard is satisfied on the "suit" issue. *See* ¶¶ *93-119.* The *only* explanation for overturning *Edgerton* on the meaning of "suit" is a passing mention that "[t]he *Edgerton* court's definition **[15]**of "suit" *gives us pause.*" ¶ 76 (emphasis added). At best, however, that explains only that the present composition of the Court now disagrees with *Edgerton's* holding that a PRP letter is not a "suit." *See* ¶¶ 77-92; ¶ 135 (Wilcox, J., dissenting). Such an explanation is insufficient, as the Court itself acknowledged in the context of the "damages" issue. ¶ 33.

The Court now has made two diametrically opposed statements concerning an insured's "reasonable expectations" in connection with the "suit" issue. *Edgerton* held that:

> *[T]he word "suit" is easily understood and unambiguous to a reasonable policyholder.* The proof

> is in the decisions that hold that a "PRP letter" is the "functional equivalent of a suit." Either there is a suit or there is not. When there is no suit, there is no duty to defend.

184 Wis. 2d at 781 (emphasis added). In this case, the Court found that an insured would have "reasonable expectations" directly contrary to the holding in *Edgerton: "[a] reasonable person in the position of the insured would expect the insured* (sic) *to provide a defense*" in the context of a PRP letter." ¶ 85 (emphasis in original).

1. The Court's decision overlooks the absence of any changes or developments in the law on whether a PRP letter is a "suit."

There have been no developments or changes in the law of Wisconsin that would justify a reversal of *Edgerton*'s "suit" holding. Numerous well-respected courts have cited *Edgerton's* holding on the "suit" issue and relied upon its **[16]**rationale in reaching the same conclusion. *See, e.g., Foster Gardner Inc. v. Nat'l Union Fire Ins. Corp.*, 959 P.2d 265, 281-82 (Cal. 1998); *Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 655 N.E.2d 842, 847 (Ill. 1995).[8] Many other courts have reached the same result.[9]

2. There are no newly ascertained facts that would require a result different from *Edgerton.*

The dissent correctly observes that "[t]his case does not present us with a wholly new set of facts." ¶ 135. The Court's decision fails to identify a single new fact since *Edgerton* that would justify overturning its "suit" holding.

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[8] *See also CIM Ins. Corp. v. Masamitsu,* 74 F. Supp.2d 975, 986 (D. Ha. 1999); *Fireman's Fund Ins. Co. v. Superior Court,* 78 Cal. Rptr.2d 418, 420 (Cal. App. 2d Dist. 1999).

[9] *See* Barry R.Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 10.04[c][2](11th Ed. 2002), and cases cited therein.

In fact, although the parties never briefed the "suit" issue, JCI"s brief actually demonstrates the correctness of *Edgerton's* holding and the inaccuracy of this Court's assumptions concerning an insured's reasonable expectations. In arguing on the "damages" issue, JCI's brief contrasted PRP letters with other forms of government action and explained that a recipient of a PRP letter is "not legally obligated to take any action." JCI's Brief at 7. JCI's brief further states "Parties receiving this type of preliminary correspondence. . . are not legally [17]obligated to take any action." *Id.* JCI's admission is contrary to the Court's conclusions as to an insured's "reasonable expectations."

3. There has been no showing that *Edgerton's* "suit" decision has become detrimental to coherence and consistency in the law.

Edgerton premised its holding on a plain and unambiguous interpretation of the word "suit," which has the same meaning in other areas of Wisconsin law as it does in the context of insurance law. 184 Wis. 2d at 744 (citing *State v. P.G. Miron Constr. Co., Inc.*, 181 Wis. 2d 1045, 1053 512 N.W.2d 499 (1994)). No Wisconsin decision since *Edgerton* has ever suggested that the "suit" rule has been a problem to apply or is in any way inconsistent with Wisconsin law.

B. The Court's Decision Violates Long-Established Wisconsin Insurance Construction Principles.

Not only does the Court's decision violate principles of *stare decisis* with respect to the "suit" issue, it also derogates well-settled principles of insurance policy construction. It has long been the law of Wisconsin that, where a provision in an insurance policy is unambiguous on its face, courts should not engage in construction of the unambiguous term. As the Court stated 25 years ago in *Mercardo v. Mitchell,* 83 Wis. 2d 17, 25, 264 N.W.2d 532 (1978):

> When no ambiguity exists, it is equally clear the court cannot construe the policy. . . to include insurance coverage that was not agreed to by the parties and for which no premium was assessed or paid. To do so would be to re-write the contract of the parties – a power the court does not have.

[18]The Court confirmed these and other fundamental principles in *Folkman*, just days after this decision. Not only did *Folkman* confirm that "the first issue in construing an insurance policy is to determine whether an ambiguity exists," but it also cited with approval other recent holdings of the court confirming that an insured may not reasonably expect coverage contrary to plain and ambiguous policy language. *Folkman*, 2003 WI 116, ¶ 13. Thus, *Folkman* quoted from *Taylor v. Greatway Ins. Co.*, 2001 WI 93, ¶ 26, 245 Wis. 2d 134, 628 N.W.2d 916, as follows:

> Because the definition of underinsured vehicle in each of American Family's policies is unambiguous standing on its own *and in the context of the whole policy*, **we do not need to engage in construction to determine Taylor's reasonable expectations.**

Folkman, 2003 WI 116, ¶ 25 (italicized emphasis in original, bold emphasis added).

In a radical departure from these long-standing rules, the Court's decision in this case suggests an entirely different analysis. Without first finding any ambiguity in the "suit" language or even addressing the fact that it had previously held the term "suit" to be plain and ambiguous in various contexts, the Court, instead, interpreted the terms according to its own conclusions of what JCI would have "reasonably expected." The Court's actions clearly violated Wisconsin law, as stated in *Folkman*, that a policyholder may not have "reasonable expectations" of coverage that are contrary to plain and unambiguous policy language.

[19]The Court's conclusion as to the insured's "reasonable expectations" was based on the Court's analysis of a "PRP letter"[10] and several separate policy provisions relating to notice of an "occurrence," notice of a claim or suit, cooperation by the insured, voluntary payments, the duty to defend and the duty to indemnify. *See* ¶¶ 77-85. However, the Court's conclusion is premised on misstatements of Wisconsin law on several issues, disregards critical language from the Wausau policies, and is contrary to the evidence of JCI's actual expectations. ¶¶ 84-85. Notably, in incorrectly concluding that an insurer's duty to defend is co-extensive with an insured's duty to give notice and cooperate, the Court ignores critical language in the insuring agreement that provides:

> [T]he company . . . may make such investigation and settlement *of any claim or suit* as it deems expedient.
> . .

Edgerton, 184 Wis. 2d at 750 (emphasis added). Only by overlooking this language, could the Court mistakenly conclude that the insurer's duty to defend "suits" must be interpreted broadly to mirror the insured's obligation to provide notice of an "occurrence, claim or suit." However, the foregoing policy language demonstrates that the insured must give notice not only of "suits" so that the insurer may defend, if necessary, but also of any "occurrence, claim or suit" **[20]**so that the insurer can exercise its right to investigate and settle "claims." Moreover, by interpreting the term "suit" to include non-lawsuit "claims," the decision violates the fundamental principle of insurance contract construction that all terms must be given meaning and not be rendered mere surplusage. *See Grotelueschen v. American Family Mut. Ins. Co.*, 171 Wis. 2d 437, 451, 492 N.W.2d 131 (1992).

Finally, not only is the court's analysis at odds with basic principles of Wisconsin insurance law and the plain and ambiguous

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[10] As explained in the dissent, not all PRP letters are the same. ¶ 160. However, because the Court did not cite to any PRP letter in the record issued to JCI or quote from any of the language of any such PRP letter, the Court must have been referring to a hypothetical PRP letter.

policy language, but its "suit" holding also guarantees additional litigation, costs, and confusion for litigants and courts.[11] Recently, the Court has seen how just two words, "crystal clear," in the decision in *Badger Mutual Ins. Co. v. Schmitz*, 2002 WI 98, ¶ 46, 255 Wis. 2d 61, 647 N.W.2d 223, created a large and "unintended effect." *Folkman*, 2003 WI 116, ¶ 30. Those two words spawned a series of court of appeals decisions within the span of a year and "reveal[ed] that our admonition of 'crystal clarity' has been used to alter the analytical focus." *Id.*

The Court's decision in this case promises much more of the same. If permitted to stand, the decision will, no doubt, allow creative lawyers to tie up the courts for years. Moreover, by apparently allowing unsupported, purported subjective interpretations to trump unambiguous policy language, the Court's **[21]**decision suggests an unending series of Catch-22 propositions for insurance companies. Insurers will never be able to evaluate or limit the coverage they write. *Edgerton* understood this problem:

> Typically insurers assess the extent of the risks insured under policies issued. The risk of liability may then be spread among groups of insureds and premiums assigned only after the extent of the risk is determined. *The original risk assessment becomes a nullity if the language of the policy is redefined in order to expand coverage beyond what was planned for by the insurer in the contract of insurance.* Policies of insurance, premised upon a certain level of predictability and assessment of risk at the time of contracting, lose their effect without the inclusion of certain basic definitions.

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[11] The Court's attempt to minimize the fall-out from its decision by limiting its holding to "PRP letters," *see* ¶ 87 n.37, will likely have no effect in restraining arguments that the Court's decision supports a new set of interpretations for insurance policies in Wisconsin.

184 Wis. 2d at 779 n.26 (emphasis added). Contrary to the Court's suggestion, insurers and policyholders relied on *Edgerton* in connection with liability policies issued decades ago because such policies provide coverage for liabilities arising from "occurrences" during the policy period regardless of when the claim is made against the insured. Thus, these policies are just as available to be called upon to provide coverage today as they were then they were first issued.

C. The Court's Decision Overlooks Important Policy Considerations.

In addition to the problems enumerated above, the Court overlooked significant policy considerations when it reversed course on the "suit" issue. Policyholders may well assert entitlement for all past "defense costs" allegedly **[22]**incurred for PRP letters within the six years preceding the decision.[12] In fact, Wausau already has received numerous claims for defense coverage and been sued by policyholders within weeks of the decision.

Numerous lawsuits likely will be filed raising the interplay between the Court's new "suit" holding and Wisconsin's duty to defend case law. *See Mowry v. Badger State Mut Cas. Co.,* 129 Wis. 2d 496, 385 N.W.2d 171 (1986); *Newhouse v. Citizens Security Mut. Ins. Co.,* 176 Wis. 2d 824, 501 N.W.2d 1 (1993). Under *Edgerton*, there was no question when a "suit" – and, therefore, an insurer's obligations to defend – began and ended. Now, an insurer faced with a tender of defense of a PRP letter may find it impossible to satisfy its obligations under Wisconsin law and thereby risk being found to have breached its duty to defend and be estopped from asserting coverage defenses. For example, without a lawsuit, it is difficult to determine whether costs incurred by an insured are costs of defending the claim or costs of satisfying any alleged liabilities arising from the claim. In addition, an insurer may find that stays of regulatory activities

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[12] The Wisconsin Statutes provide for a six-year statute of limitations on breach of contract claims. *See sec.* 893.43, Stats; *see also* sec. 631.83(1)(d), Stats.

associated with a "PRP letter" may not be had while coverage litigation proceeds. A policyholder thus may claim the insurer should incur hundreds of thousands (if **[23]**not millions) of dollars in "free defense" costs while coverage issues are being litigated.[13]

In ruling on the "suit" issue, the Court overlooked these important policy considerations and should reconsider its decision.

* * * *

[13] Similarly, with respect to numerous claims that were properly denied by insurers over the years based on *Edgerton*, policyholders now may attempt to use the decision to improperly assert that such denials constitute breaches of contract and/or bad faith.

(4)

Supreme Court, U.S.
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No. 03-1199

IN THE

Supreme Court of the United States

EMPLOYERS INSURANCE COMPANY OF WAUSAU,
Petitioner,

v.

JOHNSON CONTROLS, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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MISCELLANEOUS

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Respondent Johnson Controls, Inc. (JCI) presented to the Wisconsin Supreme Court *only* the question whether JCI's liabilities for environmental response costs are "damages" within an insurer's duty to indemnify under a general liability insurance policy. Nothing in JCI's petition for review or briefs on the merits suggested that the court should *also* consider whether a PRP letter is a "suit" within an insurer's separate duty to defend. Yet the Wisconsin Supreme Court decided the "suit" issue without notifying Wausau that the issue was under consideration or affording it an opportunity to be heard on that question.[1] JCI's efforts to obscure matters cannot retroactively alter those historical facts.[2]

Those facts—lack of notice or an opportunity to be heard—establish that Wausau was denied due process. JCI's attempts to avoid that conclusion are based on false premises. JCI overstates the due process principle that Wausau advocates and thus never actually confronts the conduct of the Wisconsin Supreme Court, which did not merely *raise* an argument not presented by the parties, but *sua sponte decided* a matter that was separate and distinct from the issue before it. As this Court and numerous lower courts have recognized, such surprise judicial decisionmaking violates due process. JCI also ignores the direct consequences that adjudication, unlike legislation or agency rulemaking, has on the parties before the court. In this case, the Wisconsin Supreme Court's action will cause substantial pecuniary harm to Wausau. Wausau was therefore entitled to

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[1] The court's opinion recognizes that the two issues are separate. The court addressed them in two separate sections of its opinion, one entitled "Are CERCLA Response Costs Damages?" and the other "Do PRP Letters Trigger the Insurer's Duty to Defend?" *See* Pet. App. 16a, 34a.

[2] Although JCI suggests that a detailed review of the record would be needed to determine what issues were before the Wisconsin Supreme Court (Opp. 12 n.7), JCI itself does not rely on any part of the record not discussed in the petition for certiorari or reprinted in the appendices already before this Court.

the protections of due process—protections that were denied to it.

1. JCI's argument that Wausau was aware that the "suit" issue was presented to the Wisconsin Supreme Court defies reality and common sense. As *amicus curiae* CICLA explains (CICLA Br. 14-15), whether a PRP letter is a "suit" within the duty to defend is of paramount significance to insurers. Unlike the insurer's indemnity obligation, which is typically limited by policy limits, the insurer's defense obligation often is not, and the cost of defending an environmental matter may well meet or exceed the indemnity costs. Thus, the holding in *City of Edgerton* v. *General Casualty Co.*, 517 N.W.2d 463 (Wis. 1994), that a PRP letter is not a "suit" was of immense importance to Wausau and the other insurer parties. Any attempt to seek overruling of *Edgerton*'s "suit" holding would have been opposed at least as vigorously as Wausau opposed JCI's effort to overturn *Edgerton*'s "damages" holding. But even though, according to JCI, this surpassingly important issue was supposedly presented to the Wisconsin Supreme Court for review, neither JCI nor Wausau addressed that issue in the briefs, and the court asked not a single question about it at oral argument.

Stripped to its essence, JCI's position is that it raised the "suit" issue in the question presented in its petition for review and in a few comments by its counsel at oral argument.[3] Neither contention is credible. JCI certainly did not "broadly [seek] review of the continuing viability" of *Edgerton* "without limitation" (Opp. i). Rather, JCI's petition presented a limited issue: "Should [*Edgerton*] be overruled in light of the 'arbitrary' and 'debatable' distinctions it has produced and the discrediting of authorities upon which it re-

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[3] JCI does not deny that the "suit" issue was not decided by the Milwaukee County Circuit Court nor raised in or decided by the Wisconsin Court of Appeals, and that under well-settled Wisconsin practice, Wausau could assume that the "suit" issue would not be decided in the first instance by the Wisconsin Supreme Court. Nor does JCI contest that it did not raise the "suit" issue in its briefs on the merits. *See* Pet. 7-9, 25 n.25.

lied?" Pet. App. 149a-150a. The " 'arbitrary' and 'debatable' distinctions" clearly referred only to *Edgerton*'s "damages" holding. *See* Pet. 6-8.[4] That point was confirmed in the body of JCI's petition, where JCI discussed the "damages" issue at length, but made *no* mention of the "suit" issue. *See* Pet. 9 n.6; Pet. App. 149a-152a.

JCI's assertion that its counsel's brief comments at oral argument—eight sentences of his 30-minute argument—provided Wausau with notice that the "suit" issue was under consideration is equally meritless. First, all of counsel's comments on which JCI relies were made in response to a question from the court *on the "damages" issue.*[5] JCI's counsel understood that the question concerned the "damages" issue, for he reframed it as: "[I]f you . . . were to consider [overruling *Edgerton*] in this case, why would you do it in this case, . . . was *Edgerton* improperly decided, and why am I right that the CERCLA response costs are damages?" In fact, no justice requested that counsel address the "suit" holding of *Edgerton.*

Second, the few remarks of counsel on which JCI relies were made (as JCI acknowledges) in support of its argument that "coverage for environmental liability" (i.e., damages, *not* defense costs) "should not depend upon the existence of

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[4] The reference to "discrediting of authorities upon which [*Edgerton*] relied" also clearly referred to the "damages" holding in *Edgerton.* As explained by the Wisconsin Supreme Court in this case (Pet. App. 33a-34a), two federal court cases on which *Edgerton* had relied in its "damages" holding were subsequently rejected by the highest courts of the states whose laws those courts were applying.

[5] Justice Ann Walsh Bradley stated, "The argument is advanced that this court has provided . . . a workable framework for handling these cases," and then asked, "why, now, in view of uncertainty and confusion that may arise from overruling this, we should do it?" Her reference to the "framework" clearly refers to decisions on the "damages" issue in *Edgerton* and *General Casualty Co.* v. *Hills*, 561 N.W.2d 718 (Wis. 1997), and the four-category "damages" framework of the Wisconsin Court of Appeals in this case. *See* Pet. 6-7. A recording of the oral argument is available at http://www.wicourts.gov/opinions/soralarguments.htm.

a lawsuit." Opp. 6; *see id.* at 5. JCI's position was that Wisconsin "damages" case law was flawed and inconsistent because (under JCI's interpretation) cleanup costs were treated as "damages" if incurred in response to a government lawsuit, but not as "damages" if incurred in response to a PRP letter. Thus, JCI's counsel referred to *Weyerhaeuser Co.* v. *Aetna Casualty & Surety Co.*, 874 P.2d 142 (Wash. 1994), for its holding that costs to comply with state environmental statutes were "damages," even though no written demand (much less any lawsuit) was made against the insured by a government agency. *Weyerhaeuser* did not even address whether a PRP letter is a "suit" within an insurer's defense obligation, and so JCI's citation to it could not have raised the "suit" issue for review. Indeed, JCI's counsel stated that an insurer's defense obligation is "separate from the duty to indemnify," and that "[i]n this case you don't even have to get to the duty to defend." Pet. 10 n.8.[6]

Third, even if JCI's counsel might have *intended* to raise the "suit" issue, as a matter of law, his sparse comments could not have given notice to Wausau that the issue was before the court. Under Wisconsin law, issues may not be raised for the first time at oral argument. *See* Wis. Stat. § 809.62(6); *A.O. Smith Corp.* v. *Allstate Ins. Cos.*, 588 N.W.2d 285, 293 (Wis. Ct. App. 1998). Thus, particularly in light of the absence of any questioning from the court on the

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[6] The other remarks relied on by JCI also were in support of JCI's "damages" argument. JCI's counsel referred to the discussion in *Quaker State Minit-Lube, Inc.* v. *Fireman's Fund Insurance Co.*, 868 F. Supp. 1278 (D. Utah 1994), *aff'd*, 52 F.3d 1522 (10th Cir. 1995), of "the full panoply of harsh things that can happen to somebody who ignores a PRP [letter]" to support JCI's argument that whether response costs are "damages" should not depend on whether there is a lawsuit against the insured. Consistent with oral argument, JCI cited *Quaker State* in its petition for review only for its "damages" holding. JCI's counsel also referred to "[t]he Indiana case, Travelers Indemnity," which he described only as setting forth the terms of an insurer's defense agreement. But no such case was cited in JCI's petition or briefs, and this vague reference could not have raised the "suit" issue for review. *See* Pet. 10 n.8.

"suit" issue, there was no reason for Wausau to think that, contrary to the Wisconsin Supreme Court's own background principle, JCI had raised that issue to the court.

JCI is thus left to argue (Opp. 5-7, 10) that the actions of Wausau's co-respondent, Travelers Indemnity Company, somehow demonstrate that Wausau had notice. This argument is meritless. Travelers' short discussion of the "suit" holding of *Edgerton* merely responded to JCI's argument that "damages" coverage should not depend on the existence of a lawsuit by pointing out that the distinction between a PRP letter and a lawsuit is real and not arbitrary, and indeed was supported by the holding in *Edgerton*, in the context of the duty to defend, that a PRP letter is not a "suit."[7] Travelers was not responding to an argument that the court should overrule its holding that a PRP letter is not a "suit," for JCI had made no such argument.[8]

2. JCI misstates the due process principle that Wausau advocates. Wausau does not contend that courts may

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[7] JCI's conjecture (Opp. 5-6) that Wausau supposedly "allocated briefing responsibility" for the "suit" issue to Travelers is simply false. The three dozen defendant-respondents in the Wisconsin Supreme Court sought additional briefing time to coordinate so that the court would not be inundated with a brief from each party. Nonetheless, there was no "allocat[ion] of briefing responsibility" for specific issues as JCI speculates. This is borne out by the fact that Wausau did not join in Travelers' brief, Travelers did not join in Wausau's brief, and several defendant-respondents joined only in Wausau's brief, but not Travelers'.

[8] JCI's suggestion (Opp. 11 & n.6) that Wausau had a constitutionally adequate opportunity to address the "suit" issue in its motion for reconsideration is baseless. JCI relies on a Wisconsin Supreme Court Internal Operating Procedure that states that the court will grant reconsideration *only* when the court has overlooked legal or factual points. That Internal Operating Procedure—which is not binding on the court, *see* Wis. S. Ct. IOP (Introduction)—plainly does not *require* the court to grant reconsideration *even when* it has committed legal or factual error. Moreover, the court is not obligated to give reasons when denying reconsideration, and it gave none in this case. *See* Pet. App. 147a. The motion for reconsideration was ultimately nothing more than a plea to the court to change its mind—an opportunity that was not a meaningful opportunity to be heard.